Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1996

ALBERTO SAN PEDRO,

*Petitioner,*

vs.

THE UNITED STATES OF AMERICA, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

*Counsel for Petitioner*

IRA J KURZBAN
2650 S.W. 27th Avenue
Miami, Florida 33133
Phone: (305) 444-0060

ARTHUR JOEL BERGER
*Counsel of Record*
Suite 506
9200 South Dadeland Blvd.
Miami, Florida 33156
Phone: (305) 670-0067

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## REASONS FOR GRANTING THE WRIT

The Government's brief actually strengthens the position of Mr. San Pedro that his petition should be granted by this Court.

The Immigration and Naturalization Service boasts that it won its turf war with the less-powerful and scattered Offices of the United States Attorneys, because it obtained issuance of an interim regulation from the Department of Justice, which, ironically, *permits* United States Attorneys to promise a cooperating criminal defendant as part of a guilty plea agreement that he will not be deported, *but only if* the prosecutor first obtains written approval from the Commissioner of the Immigration and Naturalization Service. That proposed regulation does not dispose of the serious constitutional and statutory issues that affect Mr. San Pedro and all others who obtained plea agreements before this regulation was created.

This case is not moot. The Service has not stopped, and has not offered to stop, the active proceedings to deport Mr. San Pedro. The Immigration and Naturalization Service can not maintain that this new regulation applies retroactively to now make illegal what was done to Mr. San Pedro or anyone else similarly situated. Rather, the Service's tactic is to proclaim that this regulation makes the petition no longer as important as it originally was. The Immigration and Naturalization Service is so wrong.

The legal issue of importance concerns the Constitution and its protection of Mr. San Pedro and other alien criminal defendants against the power of the Immigration

and Naturalization Service. While this new regulation ends the inter-departmental turf war, the promulgation of that new regulation does not undo the promise made to Mr. San Pedro that he would not be deported. Initially, petitioner San Pedro argued that the Government had to keep its fulfillable promise. The Government relegates its response regarding that Due Process Clause argument to a final and terse single paragraph on pages 11 and 12 of its brief. The Government argues that this Court has never held that the Due Process Clause requires the specific performance of any fulfillable promise made by a prosecutor as part of a plea bargain agreement, but only those promises which the prosecutor had actual authority to make. Viewed broadly, a decision by this Court on that issue will affect *all* plea bargaining, no matter what the nature of the agreement is.

If this Court were to limit specific enforcement of a promise to those situations where the prosecutor had actual authority to make the promise, the Government's position begs the underlying question whether the prosecutor in this case had actual authority to make a promise of non-deportation. The Immigration and Naturalization Service subtly suggests that the only source of that authority is the Attorney General of the United States, who is responsible for the promulgation of this interim regulation, who supervises both the Immigration and Naturalization Service and the various Offices of the United States Attorney, and who represents the Government in this Court. Petitioner San Pedro and two lower appellate courts say that a federal prosecutor does have that authority. The issue of the actual authority of the various United States Attorneys depends not on a grant

of power from the Attorney General, but rather a grant of power from Congress! Congress is supreme in the area of deportation. The underlying issue of whether Congress has granted actual authority to federal prosecutors is a very good reason to grant review. The determination of whether Congress granted prosecutors the authority to make the promise of non-deportability requires a construction of several different statutes, none of which either expressly grants or expressly forbids the making of such a promise.

Even if the Immigration and Naturalization Service could obtain a holding from this Court that Congress never granted such authority to prosecutors, this case is still worthy of review. Then, this Court would have to decide the important question of whether a criminal defendant is entitled to specific performance of a plea-bargain promise that was fulfillable and was not expressly forbidden by any act of Congress, when the prosecutor lacked actual authority to make that fulfillable promise.

The Government's brief exposes another subsidiary legal issue that is contained in the questions presented by this petition. On page 8 of the Government's brief, the Government presumes, as did all of the lower courts that addressed this issue, that the concepts of estoppel and apparent authority do not apply to bind the Government, if the person acting for the Government did not have actual authority. This position is based on the belief that two prior holdings from this Court control. Those holdings are stated in two civil litigation cases, *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947) and *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917). This Court

should resolve whether those two civil cases apply in the criminal context addressed by *Santabello v. New York*, 404 U.S. 257 (1971). It is submitted that a criminal defendant has an actionable due process claim, even if the prosecutor only had apparent authority. The constitutional claim and remedies discussed in *Santabello* incorporate the concepts of estoppel and apparent authority, rather than reject them. A guilty plea based on a breach of a promise is no less a violation of the Due Process Clause, if the prosecutor only had apparent authority to make the promise. This body of law has always focused on inducement of and reliance by the criminal defendant, not on the authority of the promisor to make a particular promise. *See also Raley v. Ohio*, 360 U.S. 423 at 437-439 (1959); *Cox v. Louisiana*, 379 U.S. 559 at 571-572 (1965). The Immigration and Naturalization Service's suggestion to the contrary also warrants this Court's review.[1]

On October 1, 1996, this Court granted review in *Ogbomon v. United States*, U.S. S.Ct. case number 95-8736. The issue presented there involves a construction of a criminal statute, 18 United States Code section 3583(d). That statute is one of the statutes involved in Mr. San Pedro's petition and used by Mr. San Pedro to demonstrate that Congress considers deportation to be a part of federal sentencing and within the domain of the Offices

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[1] This issue will remain in the future, even if this interim regulation becomes law. A prosecutor could still make a promise of non-deportation. That promise might violate this regulation, but could still be relied on to obtain a guilty plea. The fact that the individual prosecutor might be subject to internal sanctions does not salve the injury to the criminal defendant.

of the United States Attorney. The issue involved in *Ogbomon* is whether Congress has granted a federal district court, itself, the power to order deportation as a part of sentencing. Thus, Mr. San Pedro's petition is related to a matter this Court has already deemed worthy of review.

In its brief in *Ogbomon*, the Government called this Court's attention to an amendment of the Immigration and Nationality Act, Title 8, which was passed several years after Mr. San Pedro's guilty plea.[2] That statute, 8 U.S.C. § 1252a(d), expressly provides for judicial deportation at the time a federal criminal sentence is imposed, "if such an order has been requested by the United States Attorney." This statute is yet another indication that Congress has always given federal prosecutors the authority to bargain with federal criminal defendants on the issue of deportability in exchange for a plea of guilty.[3] Because the Office of the United States Attorney is empowered to request deportation as part of its criminal prosecution, a

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[2] Pub. L. No 103-416, § 224(a), 108 Stat. 4305, 4322-4323 (1994).

[3] That statute requires the United States to file a notice of intent to seek deportation prior to the commencement of the trial or the entry of a guilty plea. The United States Attorney is required to serve that notice on both the criminal defendant and the Immigration and Naturalization Service. Congress requires the Commissioner of the Service to concur in the prosecutor's request prior to sentencing. However, if the United States Attorney does not request deportation in that criminal proceeding, Congress has not given the Service authority to do so in that criminal proceeding. Based on this statute, it is now obvious that a criminal defendant can bargain with the prosecutor, to obtain a promise from the prosecutor that the Government would not request deportation.

prosecutor can bargain away that request in exchange for a guilty plea. Consequently, Congress has made it likely that the issue presented by Mr. San Pedro's petition can appear in the future.

In footnote 6 of the brief for the United States in opposition to the granting of this petition, the Government asserts that this case should not be reviewed, because, as a matter of fact, there was no promise made by the prosecution that Mr. San Pedro would not be deported. The trial court entered a summary judgment, but not on the basis that no promise was made. Indeed, at the only trial court hearing prior to the entry of the order granting summary judgment, the trial judge stated, based on the evidence before her: ". . . I'm convinced that there are enough disputed issues of fact about whether a promise was made or not,. . . . " (1st Supp. R. Vol. 1 at page 20). No decisive factual finding was made by the district court, because this case was decided on the Government's motion for a summary judgment, because there was a factual dispute on the issue of whether a promise was made, and because the law regarding summary judgments required the trial court to resolve that factual dispute in favor of Mr. San Pedro. Because there has yet been no trial on this factual issue, it is inappropriate for the Government to seek to avoid review by an assertion that no promise was made.

The final arbiter of the Constitution must be this Court, not the Immigration and Naturalization Service. The Service should not be able to outmaneuver the Justices of this Court by promulgating a regulation, which really does no more than mask the issues. It is obvious that the questions concerning the Due Process Clause and

plea bargaining, as well as the issue of the authority of federal prosecutors in the area of deportation, are of continuing national importance.

## CONCLUSION

For the above-stated reasons and those presented in the original petition, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRA J. KURZBAN
2650 S.W. 27th Avenue
Miami, Florida 33133
Phone: (305) 444-0060

ARTHUR JOEL BERGER
*Counsel of Record*
Suite 506
9200 South Dadeland Blvd.
Miami, Florida 33156
Phone: (305) 670-0067